

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation)	
of the)	
)	
DEPARTMENT OF FAIR EMPLOYMENT)	Case No.
AND HOUSING)	
)	E 95-96 C-0891-00-s
v.)	E 95-96 C-0891-01-s
)	97-14
RICHARD PEREZ dba MUSIC FACTORY;)	
RICHARD PEREZ, as an Individual)	
and Managing Agent,)	
)	
Respondents.)	DECISION
-----)	
-)	
TINA MARIE RAY)	
)	
Complainant.)	

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. We have corrected a typographical error on page 15. The Commission also designates this decision as a precedential decision, pursuant to Government Code sections 11425.60 and 12935, subdivision (h).

Commissioner Cheng has filed a concurring and dissenting opinion.

DATED: November 5, 1997

LYDIA I. BEEBE

T. WARREN JACKSON

PHYLLIS W. CHENG

MICHAEL M. JOHNSON

ANN-MARIE VILLICANA

CONCURRENCE AND DISSENT

I concur in the Commission's decision, but would have supported an award of \$25,000 in compensatory damages for complainant Ray's emotional distress.

I dissent from the first paragraph which follows the heading "Deprivation of Discrimination-Free Work Environment" on page 14.

PHYLLIS W. CHENG

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Respondents.)	PROPOSED DECISION
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Hearing Officer Steven C. Owyang heard this matter on behalf of the Fair Employment and Housing Commission on August 26, 1997, in Visalia, California. Michael F. Sweeney, Staff Counsel, represented the Department of Fair Employment and Housing. Complainant Tina Marie Ray was present at the hearing.

Neither respondents nor counsel for respondents appeared at the hearing. The record was held open for the filing of a post-hearing brief and exhibit. The Department of Fair Employment and Housing timely filed its post-hearing brief and exhibit on September 19, 1997, and the case was submitted on that date.

The Department's post-hearing exhibit was a grant deed recorded at the Fresno County Recorder's Office. The exhibit was marked and admitted into evidence as Exhibit 12.

After consideration of the entire record and all arguments, the Hearing Officer makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On June 11 and 12, 1996, complainant Tina Marie Ray (complainant) filed written, verified complaints with the Department of Fair Employment and Housing (Department) against the Music Factory and Richard Perez. The complaints alleged that, within the preceding year, Perez, the owner of the Music Factory, had constructively discharged complainant in retaliation for opposing unlawful practices under the Fair Employment and Housing Act (Act). (Gov. Code, §12900 et seq.) The Department served the complaints, by certified mail, on Richard Perez and the Music Factory at 2153 South Mooney Boulevard, Visalia.

2. In a June 27, 1996, letter, attorney Nicholas Wagner informed the Department that he represented Richard Perez and the Music Factory in the instant matter.

3. On July 1, 1996, Perez submitted to the Department a response to complainant's complaints.

4. On May 7, 1997, complainant filed amended complaints alleging that the Music Factory and Richard Perez had sexually harassed her, cut her working hours in retaliation for refusing the sexual harassment, and constructively discharged her, in violation of the Act. The Department served the amended complaints, by certified mail, on Richard Perez and the Music Factory at 2153 South Mooney Boulevard, Visalia. Perez signed the certified mail receipt card, and indicated that his new address was 2039 South Mooney Boulevard, Visalia.

5. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On June 10, 1997, Nancy C. Gutierrez, in her official capacity as Director of the Department, issued an accusation against respondents Richard Perez dba Music Factory (respondent Music Factory), and Richard Perez, as an individual and managing agent (respondent Perez). The accusation charged respondents with retaliation and sexual harassment against complainant, in violation of Government Code section 12940, subdivisions (f) and (h)(1).

6. The Department served the accusation and accompanying information, by certified mail, as follows:

a. On June 10, 1997, the Department served Nicholas Wagner, respondents' attorney of record. The Department received a signed certified mail return receipt for that mailing.

b. On June 10, 1997, the Department served respondents at 2426 North Blackstone Avenue, Fresno; the

Department found this address listed in Perez's "doing business as" filing.

c. On June 23, 1997, the Department served respondents at 2039 South Mooney Boulevard, Visalia. This was the address Perez provided to the Department in May 1997, after he received the amended complaints, and was the latest address respondent had filed with the Department. The Department received a signed certified mail return receipt for that mailing.

d. On June 23, 1997, the Department served respondents at 1771 East De Young Avenue, Fresno. A grant deed recorded at the Fresno County Recorder's Office shows Perez as the owner of real property at this address.

7. On August 4, 1997, and August 7, 1997, respectively, the Department sent, by certified mail, the Amended Notice of Hearing, to respondents and attorney Wagner, notifying them of the August 26, 1997, hearing in this matter. The Department sent the notice to respondents at the 2039 South Mooney Boulevard and 1771 East De Young Avenue addresses. The Department received a signed certified mail return receipt for the mailing to the 1771 East De Young Avenue address.

8. In a letter dated August 15, 1997, attorney Wagner informed the Commission that, as of July 11, 1997, he no longer represented respondents in this matter. Wagner attached to his letter a July 11, 1997, letter he had sent to Perez, confirming that he no longer represented Perez or the Music Factory. Wagner's letter to Perez further informed Perez that he faced a default judgment if he did not respond to the Department's accusation. Wagner's July 11 letter to Perez was addressed to 1771 East De Young Avenue, Fresno. Respondents did not appear at the hearing, and the hearing proceeded as a default.

9. In 1996, respondent Perez owned and managed the Music Factory, a store located at 2153 South Mooney Boulevard, in the Visalia Mall, Visalia, California. The Music Factory sold musical instruments, speaker systems, lighting equipment, posters, tee-shirts, and adult novelties. Respondents employed several, but fewer than five, employees. Respondents are "employers" within the meaning of Government Code section 12940, subdivision (h)(3)(A). Respondents are also "persons" within the meaning of Government Code section 12940, subdivision (f).

10. Complainant applied for a job at the Music Factory on April 14, 1996. Respondent Perez interviewed complainant and immediately hired her as a cashier. Respondents paid complainant \$4.25 per hour, and she worked 35 hours per week. Perez told complainant that he would also be pay her a commission on her

sales, after she learned about the equipment sold by the store. Complainant and Perez usually worked together on the day shift, which started at 10:00 a.m. Assistant Manager Jack Carey and cashier Leslie Hinkle worked the evening shift.

11. Complainant was 21 when she worked for respondents. She was a single mother, and had a nine month-old son, Ashton. Complainant had been on welfare, and she viewed her new job as an important step toward self-sufficiency for herself and her son.

12. Complainant worked for respondents from April 14 to May 8, 1996. Complainant and Perez had a business-like relationship in her first week at the Music Factory. After her first week, however, Perez exhibited a growing personal and sexual interest in complainant:

a. Perez began to talk to complainant about his personal life. He repeatedly told complainant that he and his "girlfriend" had been together for a long time, that he was unhappy with his girlfriend, and that his girlfriend did not make him happy. Perez sometimes referred to his "girlfriend" as his "wife." Complainant was unsure whether Perez was married.

b. Perez frequently commented on complainant's appearance. He often complimented complainant's eyes, saying that they were "dreamy" and "so pretty." He complimented complainant's long hair.

c. Perez also began to bring flowers to work for complainant. On several occasions, Perez brought complainant a single rose. On other occasions, he brought complainant bouquets of flowers. He told complainant he enjoyed seeing her smile, and that a pretty person deserved something pretty like roses.

d. Complainant often caught Perez staring at her. When complainant asked if anything was wrong, Perez replied that he was admiring how pretty she was.

e. On one occasion, Perez and complainant were alone in the store. Perez picked up a guitar and sang a love song to complainant. He used complainant's name in the song, and looked directly at complainant as he sang.

f. On several occasions, Perez commented to complainant that he would like to see her wear tighter jeans. Perez also asked complainant to tuck in her tee-shirt so that she could "show off [her] butt."

g. Complainant was offended by many of Perez's comments about her appearance. She had worked in her father's family business, and he had always treated his employees in a business-like manner.

13. Complainant's friend, Lindsay Cochran, worked elsewhere in the Visalia Mall, and visited complainant at the Music Factory. Cochran was present and heard some of Perez's comments about complainant's appearance, clothing, and hair.

14. After about two weeks on the job, Perez invited complainant to join him at a Chamber of Commerce barbeque party. Complainant declined his invitation.

15. During her third week of work, Perez approached complainant at work with numerous brochures for out-of-town accommodations. He showed her a brochure for a resort in Oxnard and invited her for a "getaway weekend" on April 27 and 28, 1996. Perez told complainant that there would be no business involved, and that they would share a room. Complainant declined his invitation, telling him that he was her boss, nothing more. Perez did not want to take no for an answer. When complainant told him that she needed to care for her son, Perez offered to take him along on the trip. Complainant had no interest in going to Oxnard with Perez. At the same time, complainant felt that her job was at stake and did not want to anger Perez or risk losing her job.

16. Perez called complainant at her apartment to press his invitation to Oxnard. Complainant again declined, but Perez persisted. Lindsay Cochran was present when Perez called, and complainant finally had Cochran tell Perez that there had been a death in complainant's family. Complainant hoped that this would get Perez to drop the invitation. Complainant wanted to find a way out of going to Oxnard, yet keep on good terms with her boss. Complainant did not go to Oxnard with Perez.

17. At first, complainant had been very happy with her new job, and told her boyfriend, Michael Schoenauer, about it. Later, she told Schoenauer that Perez was pursuing her and giving her flowers. Complainant also told Schoenauer about Perez's invitation to Oxnard. These revelations caused problems between complainant and Schoenauer. Schoenauer was worried and jealous. They fought and argued about complainant's situation, and complainant became reluctant to talk about it to Schoenauer.

18. Around May 2, 1996, Perez asked complainant to go to Yosemite National Park on a business trip. Complainant was to go with two "dee-jays" (i.e., disc jockeys) who worked under

contract with Perez. The disc jockeys were scheduled to put on a dance for the Forest Service on May 6. Perez told complainant that she would help the disc jockeys set up and operate the sound and lighting equipment. In the process, complainant would learn about the equipment, which in turn would help her sell and earn commissions on similar items in the store. Perez told complainant that she and the disc jockeys would go to Yosemite, work the dance, then come back after midnight that same night. Perez told complainant he would pay her \$100 for the trip. Perez would not be going on the trip. Complainant readily agreed to go on this assignment; she looked forward to learning about the equipment, and saw this as a positive opportunity in her job.

19. Around noon on May 6, complainant's mother drove complainant to the mall to meet the disc jockeys for the trip to Yosemite. Complainant had arranged for her mother to take care of her son that day. Complainant planned to spend the night with her son at her mother's house when she returned from Yosemite late that night.

20. Complainant met the disc jockeys, Max Carter and a man named Kelly, at the mall as planned. They had a van loaded with equipment for the dance. Complainant was surprised, however, that Perez was also there; Perez announced that he was joining them for the trip. The four drove in the van to Fresno, where they picked up additional equipment and a second van. From Fresno, disc jockeys Max and Kelly proceeded to Yosemite in one van, while Perez and complainant went in the other van.

21. Before entering Yosemite, Perez stopped at a grocery store and bought about \$50 worth of alcohol. Perez told complainant that the alcohol was for Max and Kelly, because they liked to "party."

22. The drive from Visalia to Fresno and then to Yosemite took four or five hours. Perez and complainant met up with the disc jockeys at around 4:30 p.m., at the Yosemite Lodge. Perez went into the lodge, then came back with keys for two rooms. He told complainant that Max and Kelly had one room, and that he and complainant would be sharing the other room.

23. Perez had not previously told complainant this would be an overnight trip, that he was going along, or that he planned to sleep with her. Complainant was surprised and worried at this turn of events, and had no interest in sleeping with Perez. While Perez was in the hotel room getting ready for the dance, complainant asked Max and Kelly what was going on. They told complainant that Perez had told them that she was his

girlfriend, that he had warned them not to talk to her, and that they should stay away from her.

24. Complainant attempted to help Max and Kelly set up their equipment. Max and Kelly were puzzled; they had no idea that complainant was there to work with them. At this point, Perez told complainant she was there for his "personal company," not to work the equipment. Complainant was furious at Perez's remark, at his plan to sleep with her, and that he had lied to her. Complainant and Perez got into a loud argument. During the argument, Perez intimidated complainant by repeatedly reminding her that he was her boss, and by warning her, "It isn't over between us." Complainant was angry and embarrassed that Perez had made her look like a "total fool" in front of Max and Kelly.

25. Complainant was stuck in Yosemite. She had no way to get back to Visalia, had not packed for an overnight stay, and had very little money with her. She turned to Max for help. Complainant explained that she was not Perez's girlfriend, and that Perez had sent her to Yosemite on the pretext that she would be learning the equipment. Complainant was very embarrassed at what had happened, and at having to seek help from Max, whom she had only met earlier that day. Max took complainant under his protection the rest of the evening, and made sure Perez and complainant were never alone. Max and Kelly showed complainant how to operate their equipment during the dance that evening. The dance ended at around 1:00 a.m.

26. Complainant did not sleep in Perez's room. Instead, she stayed in Max and Kelly's room, away from Perez.

27. The next morning, May 7, complainant had to ride back to Visalia with Perez because Max and Kelly needed to return to Fresno. On the ride back, Perez tried to apologize, but said he had not done anything wrong. As they got closer to Visalia, complainant called her mother to tell her she was on her way home; complainant's mother had been extremely worried when complainant had not returned after the dance. Complainant had not called her mother earlier because she did not have enough money to make a long distance call from Yosemite.

28. Once back in Visalia, complainant told her boyfriend what had happened at Yosemite. Complainant was very upset, as was Schoenauer. Schoenauer was angry, suspicious and did not know what to believe. Schoenauer had tried to contact complainant through her telephone pager while she was in Yosemite, but she had not received his messages. Complainant and Schoenauer argued.

29. Complainant went to work as scheduled the next day, May 8, 1996. When she arrived at the Music Factory, Schoenauer was already there talking with Perez; Schoenauer wanted Perez's side of the story. Perez told Schoenauer that the Yosemite trip was only a business trip, that he had paid complainant \$100 for the trip, and that complainant had been drinking and had come on to him (Perez); none of these statements was true. Complainant was furious that Perez lied about her to her boyfriend.

30. Complainant and Schoenauer saw that Perez had crossed off all complainant's work hours on the Music Factory's work schedule for the rest of the week. Complainant asked Perez why he had cut her hours. Perez replied that he wanted to give complainant more time to spend with her boyfriend. Complainant told Perez that she could not continue to work under such conditions, with Perez lying to her, and with her hours cut so drastically. She told Perez she was forced to quit. Complainant quit her job with respondents on May 8, 1996, because Perez had deceived her about the Yosemite trip, cut her hours after she refused to sleep with him, and lied to her boyfriend.

31. Complainant was distraught about the Yosemite trip. She hated herself, and looked at herself in the mirror to try to understand what had gone through Perez's mind. Complainant cut her hair short, because Perez had liked it long. Complainant looked through her closet, worried that she might have worn something to make Perez think she would sleep with him. Complainant had not worn "trashy" clothes to work, but complainant still wondered if Perez's advances had been her own fault.

32. Complainant looked for other employment immediately after quitting her Music Factory job. She applied for work at various businesses, retail stores, markets, and health care and childcare facilities. Complainant worried that potential employers, especially men, would judge her by her looks or her clothes.

33. Complainant was unemployed from May 8 to July 14, 1996. This period was very stressful and emotionally difficult. Having been on welfare before, losing her job made complainant feel like she was going backwards. She had to support her son and worried about finding another job. She could not afford to pay her rent and utilities, and therefore had to move in with her father. She had to take her son out of day care because she could not afford it; this made her job search more difficult. Complainant felt that she had failed her son. Complainant lost self-esteem and confidence in herself, thinking that she could not keep a simple cashier's job.

34. Perez's unwanted sexual advances, and complainant's resulting unemployment, also caused complainant significant physical problems. She did not feel like eating, and her weight dropped from 105 pounds to 95 pounds. Complainant missed or had irregular menstrual cycles from May 1996 to July 1997.

35. On July 14, 1996, complainant began work for Young's Market. Complainant was paid \$5.00 per hour, and worked 35 hours per week. She worked there for two months, and was then dismissed. Complainant was unemployed again until May 1997.

36. Complainant's experience at the Music Factory caused ongoing problems in her relationship with her boyfriend. They sometimes argued about what had happened. Complainant, who had been happy and outgoing, often became closed and withdrawn. She blamed herself for things that were not her fault.

37. Complainant's emotional state improved somewhat after May 1997, when she found a new job as a cashier at the Jockey Club. Complainant was still employed at the Jockey Club at the time of the hearing. Her new employer and her customers often compliment her work. Complainant's confidence has improved, and she has regained the weight she previously lost.

38. Respondents provided no sexual harassment training to their employees, and had no policy to prevent or investigate sexual harassment.

39. The Music Factory was no longer in business at the time of hearing.

DETERMINATION OF ISSUES

Jurisdiction

The Administrative Procedure Act (APA) (Gov. Code, §11370 et seq.) allows the Commission to issue a decision after a respondent fails to appear at hearing. (Gov. Code, §11520.) In that event, the Commission's decision can be based upon the respondent's express admissions or upon other evidence introduced at hearing by the Department. (Ibid.; Cal. Code of Regs., tit. 2, §7459.3, subd. (a).)

The Commission, however, cannot issue a decision adverse to a respondent in a default case unless the Department has properly served the respondent. Government Code section 11505, subdivision (a), provides that upon the filing of an

accusation, the Department must "serve a copy thereof on the respondent as provided in subdivision (c)." Subdivision (c), states:

The accusation and all accompanying information may be sent to the respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires the respondent to file the respondent's address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency.

Similarly, our regulations provide that an order adverse to a respondent cannot be issued unless the respondent, or his attorney or representative, has been personally served, served by registered mail, filed a notice of defense, or otherwise appeared. (Cal. Code of Regs., tit. 2, §7435.) Service by certified mail complies with the statutory and regulatory requirement for registered mail. (Gov. Code, §8311; Evans v. Department of Motor Vehicles (1994) 21 Cal.App.4th 958, 969-970; Cal. Code of Regs., tit. 2, §7434, subd. (b).) Proof of service by registered or certified mail is made by affidavit or certificate affixed to the original or to a true copy of the document, and may, but need not, be accompanied by a returned post office receipt. (Cal. Code of Regs., tit. 2, §7422, subd. (d)(2).) Our regulations require respondents to file their address with the Department and to notify the Department of any change. (Cal. Code of Regs., tit. 2, §7411.)

As set forth in the Findings of Fact, respondents were on notice of and responded to complainant's complaints and amended complaints. Respondents were represented by counsel from shortly after the original complaints were filed to shortly before the hearing took place. The Department served the accusation and accompanying information on respondents at various addresses, including the latest address filed with the Department by respondents. The Department also served the accusation and

accompanying information on respondents' attorney, Nicholas Wagner. Finally, the Department notified respondents and attorney Wagner of the hearing in this matter. Wagner warned Perez that he faced a default if he did not respond to the Department's accusation.

The Department properly served respondents with the accusation and accompanying information. Moreover, respondents were on notice of the hearing in this matter. We conclude that the Commission has jurisdiction over, and is authorized to issue an order adverse to, respondents.

Liability

The Department alleges that respondent Richard Perez sexually harassed complainant Tina Marie Ray, reduced complainant's work hours in retaliation for her opposition to his sexual harassment, and caused her constructive discharge. The Department further asserts that respondents failed to maintain or enforce a sexual harassment policy. The Department asserts that respondents thereby violated Government Code section 12940, subdivisions (f) and (h).

A. Sexual Harassment

It is unlawful for an employer to sexually harass an employee. (Gov. Code, §12940, subd. (h)(1).) If a preponderance of all the evidence demonstrates that unwelcome sexual conduct or other hostile or unwelcome conduct linked to sex has occurred, that this conduct led to the deprivation of an employment benefit or benefits, and that respondents can be held liable for these actions, we will determine that respondents engaged in unlawful sexual harassment. There is no affirmative defense which would render sexual harassment lawful. (DFEH v. Madera County (1990) FEHC Dec. No. 90-03, at p. 18 [1990-91 CEB 1].)

1. Work Environment Sexual Harassment

Complainant, like all employees, is entitled to the benefit of a "discrimination-free workplace," a work environment free of harassment. (Cal. Code of Regs., tit. 2, §§7286.5, subds. (f), and (f)(3), and 7287.6, subd. (b).) Unwelcome sexual conduct that deprives an employee of this substantial benefit is itself unlawful under the Act, whether or not the conduct also results in the loss of some more tangible employment benefit, such as a promotion, pay increase, or employment itself. (Cal. Code of Regs., tit. 2, §7287.6, subd. (b); Peralta Community College Dist. v. Fair Employment & Housing Com. (1990) 52 Cal.3d 40, 52; Rojo v. Kliger, supra, 52 Cal.3d 65, 73, fn. 4; Fisher v.

San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 608; DFEH v. Donald Schriver, Inc. (1991) FEHC Dec. No. 91-11, at pp. 8-9 [1990-91 CEB ___], orig. decision affd. in part and revd. in part, Donald Schriver, Inc. v. Fair Employment & Housing Com. (1986) 220 Cal.App.3d 396.)

a. Whether Unwelcome Sexual Conduct Occurred

The Department asserts that respondent Perez subjected complainant to repeated unwelcome sexual comments and invitations, and that Perez attempted to coerce and intimidate complainant into having sexual relations with him. This behavior, if it occurred, constitutes the kind of hostile sexual conduct that may form the basis for a sexual harassment violation under the Act. (Cal. Code of Regs., tit. 2, §§7287.6, subd. (b)(1), and 7291.1, subd. (f)(1); Peralta Community College Dist. v. Fair Employment & Housing Com., supra, 52 Cal.3d 40, 45, fn. 2; Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d 590, 607-608; DFEH v. Bee Hive Answering Service (1984) FEHC Dec. No. 84-16, at p. 18 [1984-85 CEB 8].)

Complainant clearly and credibly testified about Perez's conduct in the store, his invitations to the Oxnard weekend, and the trip to Yosemite. Her testimony was consistent and unrefuted. Complainant's account was corroborated by Lindsay Cochran, who heard some of Perez's comments to complainant, and who spoke with Perez when he called complainant at home to press his Oxnard invitation. Complainant's account was further corroborated by her boyfriend, Michael Schoenauer. Schoenauer was present when Perez lied about complainant's conduct at Yosemite and cut complainant's hours. We conclude that respondents subjected complainant to unwelcome sexual conduct, as described in the Findings of Fact.

b. Deprivation of Discrimination-Free Work Environment

Unwelcome sexual conduct deprives its victim of a discrimination-free work environment when the conduct is sufficiently severe or sufficiently pervasive to alter the conditions of the complainant's employment by creating an intimidating, oppressive, hostile, abusive or offensive work environment or otherwise interfering with the complainant's emotional well-being or her ability to perform her work. (Rojo v. Kliger, supra, 52 Cal.3d 65, 73, fn. 4; Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d 590, 607-610, citing Meritor Savings Bank v. Vinson (1986) 477 U.S. 57; DFEH v. Madera County, supra, 1990-91 CEB 1, at p. 21.)

Respondent Perez subjected complainant to unwanted personal and sexual attention, beginning in her second week of employment. Perez told complainant that he was unhappy with his girlfriend. He frequently commented on complainant's appearance. He told her to wear tighter jeans and to show off her butt. He brought her flowers, sang a love song to her, and asked her to attend a Chamber of Commerce barbeque with him.

Perez's unwanted sexual conduct escalated during complainant's third week of work. Perez invited complainant to spend the weekend and share a room in Oxnard. Complainant declined the invitation, and made clear that he was her boss and nothing more. Perez nevertheless persisted in his invitation, both at the store and by calling complainant at home. Perez put complainant in a difficult position. Complainant felt her job was at stake, so did not want to anger him, but she had no interest in going away with him. Complainant finally had her friend Lindsay Cochran tell Perez there had been a death in complainant's family, in an attempt to get him to drop his invitation.

What Perez could not accomplish by direct invitation he next sought to achieve by deceit. Perez induced complainant to go to Yosemite under false pretenses. What was supposed to be a one day business trip turned into a crude attempt by Perez to coerce and intimidate complainant into sleeping with him. When complainant objected to serving as Perez's "personal company," Perez repeatedly reminded her that he was her boss, and that it was "not over" between them. Complainant was stuck in Yosemite with no way to get back to Visalia, unprepared for an overnight stay, and with little money. She was forced to stay with Max and Kelly, although she had only met them that day.

We conclude that Perez's unwanted comments, invitations, and attempts to manipulate complainant into having sex with him were sufficiently severe and sufficiently pervasive to render complainant's work environment hostile, abusive and offensive, and to deprive her of a discrimination-free workplace, in violation of Government Code section 12940, subdivision (h).

B. Retaliation

The Department further asserts that respondents cut complainant's work hours in retaliation for complainant refusing to have sex with Perez, and that complainant was thereby forced to resign her job.

Government Code section 12940, subdivision (f), provides that it is an unlawful employment practice, "For any

employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (Emphasis added.) Respondents employed fewer than five employees, so are not "employers" for purposes of this provision, but they are "persons" subject to this provision.

To establish a retaliation violation under Government Code section 12940, subdivision (f), the Department must prove by a preponderance of the evidence that complainant engaged in a protected activity, that she suffered an adverse employment action, and that a causal connection exists between the protected activity and respondents' adverse action. (Gov. Code, §12940, subd. (f); Flait v. North American Watch Corp. (1992) 3 Cal.App.4th 467, 476; Fisher v. San Pedro Peninsula Hospital, supra, 214 Cal.App.3d 590, 614; DFEH v. Madera County, supra, 1990-91 CEB 1, at p. 33.

Complainant engaged in protected activity by refusing Perez's attempts to manipulate her into having sex with him. During their argument at Yosemite, Perez reminded complainant that he was her boss, and warned her that it was "not over" between them. The next time complainant came to work, May 8, 1996, Perez drastically cut complainant's work hours, telling her this would allow her to spend more time with her boyfriend. The reduction in hours was clearly in retaliation for complainant spurning Perez's plan to sleep with her.

The Department further asserts that respondents constructively discharged complainant. To prove a constructive discharge, the Department must establish by a preponderance of the evidence that respondents "either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (Turner v. Anheuser-Busch, Inc. (1994) 7 Cal.4th 1238, 1251; cf. DFEH v. Del Mar Avionics (1985) FEHC Dec. No. 85-19, at p. 23 [1984-85 CEB 16].)

As the owner of the Music Factory and as complainant's direct supervisor, Perez personally and intentionally created aggravated, intolerable working conditions for complainant. He attempted to coerce complainant into having sex with him; when

she refused, he retaliated by drastically reducing her work hours. A reasonable employer would undoubtedly know that a reasonable employee in complainant's position would be compelled to resign. We therefore determine that respondents caused complainant's constructive discharge, in violation of Government Code, section 12940, subdivision (f).

C. Respondents' Liability

An employer is strictly liable under the Act for the harassing conduct of its agents and supervisors against any of its employees. (Gov. Code, §12940, subd. (h)(1); Cal. Code of Regs., tit. 2, §§7286.6, subd. (b), and 7287.6, subd. (b)(2); Farmers' Insurance Group v. County of Santa Clara (1995) 11 Cal.4th 992, 1014; Kelly-Zurian v. Wohl Shoe Company (1994) 22 Cal.App.4th 397, 414-15; Fisher v. San Pedro Peninsula Hospital, *supra*, 214 Cal.App.3d 590, 608, fn. 6; Donald Schriver, Inc. v. Fair Employment & Housing Com., *supra*, 220 Cal.App.3d 396, 406.)

Richard Perez was the owner of the Music Factory and complainant's direct supervisor. Respondents are liable for complainant's sexual harassment and retaliatory constructive discharge.

The Department also asserts that respondent Perez is personally liable under the Act. We agree. Government Code sections 12926, subdivision (d), and 12940, subdivision (h)(3)(A), define an employer as "any person acting as an agent of an employer, directly or indirectly." In considering whether a person may properly be deemed an "employer" under this definition, we have looked to the degree which that person significantly affects access to employment, and not whether that person is an employer or agent in the conventional sense. (DFEH v. Del Mar Avionics, Inc., *supra*, 1984-85 CEB 16, at p. 24.) We have previously held liable as an agent/employer those persons having supervisory status who either themselves did the wrongful act or participated in the decision-making process which formed the basis of the discriminatory action. (DFEH v. Bee Hive Answering Service, *supra*, 1984-85 CEB 8, at pp. 14-16; DFEH v. Guill, Blankenbaker & Lawson (1991) FEHC Dec. No. 91-16, at pp. 15-16 [1990-91 CEB 10]; DFEH v. Madera County, *supra*, 1990-91 CEB 1, at pp. 23-28. Respondent Perez is personally liable as an agent/employer.

Finally, respondent Perez is liable as a "person" under Government Code section 12940, subdivision (f), for his retaliation against and constructive discharge of complainant.

D. Failure To Take All Reasonable Steps Necessary To Prevent Harassment

The Department also charges that respondents violated the Act by failing in their affirmative duty, under Government Code section 12940, subdivision (h), to take all reasonable steps necessary to prevent unlawful harassment from occurring.^{1/} Respondents had an ongoing obligation, independent of any claim or proof of actual harassment, to "establish affirmative programs which include prompt and remedial internal procedures" for handling sexual harassment complaints. (DFEH v. County of

^{1/} When the Legislature added subdivision (i) to the Act, it made this statement about subdivisions (h) and (i):

It is the existing policy of the State of California, as declared by the Legislature, that procedures be established by which allegations of prohibited harassment and discrimination may be filed, timely and efficiently investigated, and fairly adjudicated, and that agencies and employers be required to establish affirmative programs which include prompt and remedial internal procedures and monitoring so that worksites will be maintained free from prohibited harassment and discrimination by their agents, administrators, and supervisors as well as by their nonsupervisors and clientele. To further this intent, the Legislature enacts this act. (Stats. 1984, ch. 1754, §1, p. 1170.)

Madera, supra, 1990-91 CEB 1, at pp. 28-29; Flait v. North American Watch Corporation, supra, 3 Cal.App.4th 467, 478.)

Respondents took no steps to prevent harassment from occurring, in further violation of Government Code, section 12940, subdivision (h).

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Remedy

A. Make-Whole Relief

Having established that respondents sexually harassed and constructively discharged complainant in violation of the Act, the Department is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury she suffered as a result of respondents' unlawful conduct. The Department must demonstrate, where necessary, the nature and extent of the resultant injury, and respondents must demonstrate any bar or excuse they assert to any part of these remedies. (Gov. Code, §12970, subd. (a); Cal. Code of Regs., tit. 2, §7286.9; DFEH v. Madera County, supra, 1990-91 CEB 1, at pp. 33-34.)

In its accusation, the Department requested an award of back pay, complainant's future wage loss, out-of-pocket expenses, damages for emotional injury, complainant's costs and expenses incurred in filing and pursuing her complaint, an administrative fine, and a variety of affirmative relief.

1. Back Pay and Future Wage Loss

In its closing argument, the Department sought back pay for the period from May 8, 1996, when she quit her job, to July 14, 1996, when she was hired at Young's Market. The Department also sought \$100.00 additional back pay for the wages Perez had promised complainant for the Yosemite trip. The Department does not seek any back pay or future wage losses beyond July 14, 1996.

Complainant earned \$148.75 per week (\$4.25 x 35 hours) working for respondents, and would have earned \$1,487.50 in the ten weeks between May 8 and July 14, 1996. Respondents will be ordered to pay complainant \$1,487.50 in back pay, plus an additional \$100.00 for the Yosemite trip, for a total of \$1,587.50. Interest will accrue on this amount, at the rate of

ten percent per year, compounded annually, from the date the earnings accrued until the date of payment. (Code of Civ. Proc., §685.010.)

2. Out-of-Pocket Expenses and Costs of Filing Complaint

The Department did not establish that complainant had any out-of-pocket expenses or costs of filing her complaint.

3. Compensatory Damages

The Department seeks an award of \$25,000 as damages for complainant's emotional distress. The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, \$50,000 per aggrieved person per respondent. (Gov. Code, §12970, subd. (a)(3).) In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. We also consider the duration of the injury and the egregiousness of the discriminatory practice. (Gov. Code, §12970, subd. (b); DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05, at pp. 10-14 [1988-89 CEB 4].)

Perez's unwanted sexual conduct caused complainant significant emotional distress. Complainant was worried, angry, and embarrassed when Perez tried to coerce her into sleeping with him at Yosemite. She was furious that Perez had lied about the trip. Perez made her look like a fool to the disc jockeys, and complainant was embarrassed to have to ask them for help. Perez brought complainant to Yosemite under false pretenses, and complainant was stuck there unprepared to stay the night, and with no way to get back to Visalia. Complainant hated herself after the Yosemite trip, and wondered if she was to blame for Perez's actions.

Perez's conduct also caused ongoing problems in complainant's relationship with her boyfriend. Her boyfriend became suspicious and jealous, and they argued.

The period between May 8 and July 14, 1996, was particularly distressing for complainant. She hated herself, and wondered if Perez's advances were her own fault. She felt she had failed her son. She had to take her son out of day care and had to move in with her father. Her job had been an important step toward self-sufficiency after being on welfare, and losing it made her feel like she was going backwards. Complainant lost self-esteem and confidence. Complainant also had physical problems. She lost weight, and dropped from 105 pounds to 95 pounds. She missed or had irregular menstrual cycles from May 1996 to July 1997.

Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (b), we will order respondents to pay complainant \$20,000 in damages for her emotional distress. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment. (Code of Civ. Proc., §685.010.)

B. Administrative Fine

The Department asks the Commission to order respondents to pay a \$10,000 administrative fine. The Commission has the authority to order administrative fines where it finds, by clear and convincing evidence, a respondent guilty of oppression, fraud, or malice, expressed or implied, as required by Section 3294 of the Civil Code. (Gov. Code, §12970, subd. (d).) The amount of the administrative fine, in combination with any amount awarded to compensate for emotional distress, cannot exceed \$50,000 per aggrieved person per respondent. (Gov. Code, §12970, subd. (a)(3).)

There is clear and convincing evidence that an order of administrative fines is appropriate here. Perez fraudulently induced complainant to go to Yosemite, where he tried to coerce her into having sex with him. After complainant rebuffed him, he reminded her that he was her boss, and warned her it was "not over" between them. Once they returned to Visalia, Perez lied to complainant's boyfriend about her, and drastically reduced her work hours to retaliate against her.

In determining the appropriate amount of an administrative fine, the Commission considers relevant evidence of, including but not limited to, the following: willful, intentional, or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of

employees; commission of unlawful conduct; intimidation or harassment; conduct without just cause or excuse; or multiple violations of the Act. (Gov. Code, §12970, subd. (d).)

Perez's attempt to coerce complainant into having sex with him was willful, intentional, and purposeful. Perez consciously disregarded complainant's rights, and tried to intimidate her by reminding her that he was her boss. Complainant had previously made clear to him that she was not interested in his invitations, yet he persisted.

Respondents also failed to prevent sexual harassment. They provided no sexual harassment training, and had no sexual harassment policy.

Respondents were a small employer, and we consider this a mitigating factor in determining the amount of the administrative fine. We will therefore order respondents to pay an administrative fine of \$5,000. The administrative fine shall be paid to the state's General Fund. (Gov. Code, §12970, subd. (d).) Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment. (Code of Civ. Proc., §685.010.)

C. Affirmative Relief

The Department requests that respondents be ordered to develop and implement an effective written policy against sexual harassment, to train their staff with respect to this policy, and to post a notice informing their employees of their rights under the Act and of respondents' unlawful conduct toward complainant.

The Music Factory was no longer in business at the time of the hearing. We therefore do not order the affirmative relief requested by the Department.

ORDER

1. Respondent Richard Perez dba Music Factory and respondent Richard Perez as an Individual and Managing Agent shall immediately cease and desist from harassment and discrimination based on sex.

2. Within 60 days of the effective date of this decision, respondent Richard Perez dba Music Factory and respondent Richard Perez as an Individual and Managing Agent **shall pay to complainant Tina Marie Ray back pay in the amount of \$1,587.50, together with ten percent interest thereon, compounded annually, from the date the earnings accrued to the date of payment.**
3. Within 60 days of the effective date of this decision, respondent Richard Perez dba Music Factory and respondent Richard Perez as an Individual and Managing Agent **shall pay to complainant Tina Marie Ray actual damages for emotional distress in the amount of \$20,000.00, together with interest on this amount running from the effective date of this decision to the date of payment and compounded annually at the rate of ten percent per year.**
4. Within 60 days of the effective date of this decision, respondent Richard Perez dba Music Factory and respondent Richard Perez as an Individual and Managing Agent shall pay to the state General Fund an administrative fine in the amount of \$5,000.00, together with interest on this amount running from the effective date of this decision to the date of payment and compounded annually at the rate of ten percent per year.
5. Within 100 days after the effective date of this decision, respondents shall in writing notify the Department and the Commission of the nature of their compliance with sections 2 through 4 of this order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition for judicial review and related papers should be served on the Department, Commission, respondents, and complainant.

DATED: October 21, 1997

STEVEN C. OWYANG
Hearing Officer